

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
April 28, 2009 Session

**STATE OF TENNESSEE v. GABRIEL CORDOVA DELAROSA**

**Direct Appeal from the Criminal Court for Knox County  
No. 88414     Mary Beth Leibowitz, Judge**

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**No. E2008-01940-CCA-R3-CD - Filed February 10, 2010**

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Appellant, Gabriel Cordova Delarosa, was convicted on his guilty plea to one count of vehicular homicide and one count of leaving the scene of an accident involving death or personal injury. He was given an effective sentence of eleven years. He appeals, contending the trial court erroneously applied several enhancement factors. Although the trial court relied upon two improper enhancement factors, upon review we nevertheless conclude that the sentence was appropriate. Therefore, we affirm the trial court's judgments.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are  
Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Mike Whalen, Knoxville, Tennessee, for the appellant, Gabriel Cordova Delarosa.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; Randall Eugene Nichols, District Attorney General; and Kevin Allen, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Factual Background**

At Appellant's plea hearing, the State detailed the following uncontested facts. The victim, Justin Heath Smith, was traveling northbound on I-140, the Pellissippi Parkway, at approximately 4:47 p.m. on Saturday, October 13, 2007. Appellant was also driving northbound on I-140 at the time, as were six witnesses listed by the State. Those six

witnesses would testify at trial that Appellant was driving erratically at speeds between 90 and 100 miles per hour, weaving in and out of traffic from guardrail to guardrail, and nearly striking other vehicles. Appellant pushed some vehicles off the road.

Appellant struck the rear of Mr. Smith's car, forcing him off the road and causing his vehicle to tumble end over end. Mr. Smith was ejected from the car and ultimately died from his injuries.

Rather than stop and attempt to aid Mr. Smith, Appellant did not even slow down. He continued to speed down I-140. About a mile down the road, his car became disabled and ran into a guardrail.

A witness approached Appellant and asked if he had been involved in an accident. Appellant responded with profanity. At that point, another individual pulled over and tried to take Appellant away. The witness pulled out a gun and detained Appellant until the police arrived.

When the police arrived, they found Appellant highly intoxicated and uncooperative. He was placed in the police cruiser, where he repeatedly struck his head until he needed medical treatment for severe bleeding. He was taken to the University of Tennessee Medical Center. While there, a blood sample was taken to assist in his treatment. That sample revealed that Appellant's blood alcohol content was .22 percent.

At Appellant's subsequent sentencing hearing, the State presented several individuals to address the court regarding the victim. They spoke glowingly of Mr. Smith and described the devastation his death caused. According to the trial court, Appellant spoke "honorably" about his recognition of the damage he caused, his regret, and his acceptance of responsibility for his actions.

The State asked the court to enhance Appellant's sentence pursuant to Tennessee Code Annotated section 40-35-114. Specifically, the State urged the court to apply enhancement factor (1), the Appellant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, based on Appellant's admission that he is an illegal immigrant and that he was previously convicted of underage consumption of alcohol. The State also contended that enhancement factor (3), the offense involved more than one victim, applied because there were numerous individuals who were pushed off the road by the Appellant. The State also asked the trial court to apply enhancement factor (10), the Appellant had no hesitation about committing a crime when the risk to human life was high, because the evidence indicated there were multiple people on the highway who were put at risk by Appellant's driving. In addition, the State asked for the

application of enhancement factor (6), the personal injuries inflicted upon, or the amount of damage to property sustained by or taken from, the victim was particularly great, and enhancement factor (9), Appellant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense.

Over Appellant's objection, the trial court applied several of the State's proposed enhancements. Although it rejected the application of enhancement factors (6) and (9), it concluded there was a basis to apply factors (1), (3), and (10). It also considered Appellant's blood alcohol content as an enhancement, while noting that it did not fall within a specific statutory enhancement factor. In pertinent part, the court stated:

[Appellant] is a young man, very young man, who is, in fact, not a legal resident of this country. He is an illegal alien. And I think that I can take notice of the verification by the Probation Office of that and of the detainer by the Customs and Immigration against him of that fact.

When he committed this offense, he was exceedingly intoxicated. He had no driver's license. He was not legally in this country. And, therefore, he does have some previous history of criminal activity, if not any proof of a criminal conviction.

...

[Appellant] tells us—and I believe what he tells me—that he has no memory of this event. However, the proof as stipulated would clearly show that [Appellant] was exceeding 100 miles an hour at times, driving erratically down a major highway, putting many drive[rs] in jeopardy, many people in jeopardy, passengers as well. Many of those people saw him go by and had to move off the highway. . . .

...

There was more than one victim, both at the scene in the people who had been endangered, and, of course, his family.

What is saddest of all is that, not only did [Appellant] attempt to flee—and he fled and he’s convicted of that offense—and that citizens had to stop and render aid for Mr. Smith as best they could as well as control [Appellant], even when some of his friends came to get him away from the[re]. . . .

. . .

The injuries about great—particularly great injuries as to Mr. Smith and the use of a deadly weapon are subsumed in this case. In this case there was absolutely no hesitation by this defendant to avoid danger to others. He endangered, as he went down the highway, many people at 4:00 o’clock in the afternoon.

. . .

So I’m going to take into consideration the following enhancing factors: I’m going to consider that his blood/alcohol level—although it is not an enhancing factor that’s listed exactly like that—was twice the legal limit. That he was **knowingly**<sup>1</sup> illegally in this country and, therefore, was violating federal law and state law and, therefore, had a previous history of illegal activity. That there were others endangered when he attempted both to flee and to drive down the road at such a high rate of speed. And fortunately Mr. Smith was the only one who wound up in the situation he found himself.

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<sup>1</sup> Emphasis in the transcript.

. . .

[Appellant] is not presumed probatable, and this was a death. And I do not wish to deprecate the seriousness of this offense. And I have more than ample information before me to require that he serve his sentence, not as a split confinement but as a service of sentence.

The trial court sentenced Appellant as a standard Range I offender to eleven years confinement for the vehicular homicide and two years for leaving the scene of an accident involving injury or death, to be served concurrently.

On appeal, Appellant argues the trial court erroneously enhanced his sentence. Specifically, he contends that the trial court erred in applying enhancement factor (1) because there was insufficient evidence to establish a history of criminal convictions. Furthermore, he asserts that the reliance upon his status as an illegal immigrant was improper. He objects to the application of enhancement factor (3) because, he claims, there was no evidence that the accident involved anyone other than Mr. Smith, and Mr. Smith's family cannot properly be considered an additional victim. He also contends that enhancement factor (10) is not applicable because the reckless mens rea required for his conviction is incompatible with the intent necessary to "hesitate" as required by the enhancement factor. Finally, he asserts that the trial court's reliance on his excessive blood alcohol content to enhance his sentence was improper. Appellant notes, as did the trial court, that enhancement for his blood alcohol level does not fall within any of the statutory enhancement factors. Moreover, he contends that the fact of intoxication is already accounted for in his sentence because it elevates his vehicular homicide from a Class C felony to a Class B felony, and thereby increases the applicable sentencing range.

## **II. Analysis**

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the appellant in his own behalf; and (8) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-

102, -103, -210 (2006); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on Appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered the sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169. "If, however, the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails . . . [and] our review is simply de novo." State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008) (citations and internal quotation marks omitted). Because we conclude the trial court erred in its application of certain enhancement factors, our review is purely de novo.

We begin with the trial court's application of enhancement factor (1). Appellant contends the court erred for two reasons. First, he argues there was an insufficient factual basis for applying this enhancement factor. Second, he contends that the trial court erred by relying on his immigration status as a basis for showing a prior criminal history. He also contends that the trial court should have reduced his sentence in consideration of his acceptance of responsibility.

Neither argument affords Appellant relief. The trial court relied upon two previous episodes of criminal conduct to trigger the enhancement: Appellant entered the country illegally and Appellant was previously convicted of underage consumption of alcohol. Appellant is correct that there was little to no documentary evidence to support a finding that he committed either offense. But, that is not necessary here because Appellant *admitted* his guilt with respect to both episodes. Appellant does not contend that he did not commit the crimes, just that the State was required to submit documentation for its claim. We disagree.

Appellant also contends that the trial court erred in considering his "continued presence" in the United States as an offense. Appellant relies upon our decision in State v. Walter Pablo, No. W2007-02020-CCA-R3-CD, 2008 WL 2938090 (Tenn. Crim. App. at Jackson, July 30, 2008), to argue that "the mere presence of an illegal alien in the United States is not a continuous violation of the law." He is correct, as far as that argument goes. However, Pablo does not prohibit a trial court from relying on a prior illegal entry as support for finding past criminal *behavior*. Furthermore, Pablo is distinguishable in both the question it presented—whether an illegal immigrant necessarily could not comply with probation restrictions—and the court's evidentiary basis for that conclusion. Id. at \*5-6.

We addressed this specific issue in State v. Guadalupe Arroyo, No. E2002-00639-CCA-R3-CD, 2003 WL 1563209, at \*1 (Tenn. Crim. App. at Knoxville, Mar. 27, 2003), where, like here, the appellant pled guilty to Class B vehicular homicide. We concluded that,

in the absence of a conviction for illegal entry, the admission of illegally entering the country is still a valid basis for finding a history of “criminal behavior” under enhancement factor (1). Id. at \*3. Thus, while Appellant is correct that illegal entry is not a continuing crime under 8 U.S.C. § 1325, see United States v. Cores, 356 U.S. 405, 408 n.6, (1958); United States v. Rincon-Jimenez, 595 F.2d 1192, 1193-94 (9th Cir. 1979), the completion of that crime in the past can support “a previous history of . . . criminal behavior” under enhancement factor (1), see Arroyo, No. E2002-00639-CCA-R3-CD, 2003 WL 1563209, at \*3.

Appellant’s admission that he illegally entered the country and his admission of a prior conviction for underage consumption properly supports an application of enhancement factor (1) based on a previous history of criminal behavior.

Next, we turn to the trial court’s conclusion that there were multiple victims, and its subsequent application of enhancement factor (3). The trial court reasoned that in addition to Mr. Smith, the other motorists at the scene and Mr. Smith’s family were also victims. Appellant contends this was error, and we agree. Appellant was convicted of two crimes, vehicular homicide, Tennessee Code Annotated section 39-13-213, and leaving the scene of an accident resulting in death or injury, Tennessee Code Annotated section 55-10-101. Vehicular homicide, by definition, has a specific victim. Our supreme court has held that trial courts cannot apply enhancement factor (3) where the charge is necessarily limited to a specific, named victim. See State v. Imfeld, 70 S.W.3d 698, 705-06 (Tenn. 2002). Unlike offenses such as arson, where there can be multiple victims but the State cannot bring multiple charges naming each individual as a victim, crimes against specific victims, like vehicular homicide, necessarily have only one victim per charge. Id. Here, that victim was Mr. Smith. Regarding the second offense, leaving the scene of an accident can have more than one victim and therefore can be enhanced under factor (3). See State v. Derrick Williams, No. W1999-01231-CCA-R3-CD, 2000 WL 1229181, at \*4 (Tenn. Crim. App. at Jackson, Aug. 18, 2000). But unlike in Williams, where there were two people in the car that was hit, here only Mr. Smith was in the car. While there is no doubt that Mr. Smith’s family and friends have been devastated by his death, for the purpose of enhancement, Mr. Smith is the only victim of that offense. The trial court thus erred in finding there were multiple victims and applying enhancement factor (3).

We next analyze the trial court’s application of enhancement factor (10). Enhancement factor (10) is applicable where “[t]he defendant had no hesitation about committing a crime when the risk to human life was high.” Appellant summarily contends the enhancement factor is inappropriate in this case “because a conviction for a reckless act assumes that the act was reckless and did not require planning or thinking through.” In other words, the mens rea for his conviction—recklessness—is not amenable to the mens rea required for one to “hesitate.”

As our supreme court has explained, “[t]he determinative language of this factor is ‘the risk to human life was high.’” State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994), superseded by statute on other grounds as stated in State v. Carico, 968 S.W.2d 280, 288-89 (Tenn. 1998). “Little, if any, emphasis is to be placed on whether the defendant ‘hesitated’ before committing the crime.” State v. Bingham, 910 S.W.2d 448, 452 (Tenn. Crim. App. 1995), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9-10 (Tenn. 2000). So long as a high risk to human life is demonstrated with facts that are not necessary to establish an essential element of the charged offense, the enhancement may apply. Id. Indeed, this court has previously approved of the application of enhancement factor (10) in cases of vehicular homicide by intoxication. See, e.g., State v. William Jeffery Sweet, No. E2008-00100-CCA-R3-CD, 2009 WL 2167785, at \*14 (Tenn. Crim. App. at Knoxville, July 21, 2009). Here, the uncontested facts establish that Appellant’s abhorrent driving placed multiple other motorists in peril. The State had six witnesses who would have testified that Appellant’s erratic driving forced some motorists off the road and placed other motorists in jeopardy. As the tragic death of Mr. Smith demonstrates, such driving clearly created a high risk to the lives of the other motorists. Consequently, the trial court did not err in applying this enhancement factor.

Finally, we turn to the trial court’s reliance on Appellant’s blood alcohol content as a basis for enhancing his punishment. Despite recognizing that it “is not an enhancing factor that’s listed exactly like that,” the trial court considered that Appellant’s blood alcohol level “was twice the legal limit.” While this might conceivably contribute to the court’s analysis of the applicability of a particular enhancement factor, it is not itself an independent factor, and the trial court did not tie its consideration of Appellant’s blood alcohol content to an enumerated factor. Moreover, as Appellant correctly points out, his intoxication during the offense is already accounted for by virtue of being charged with a Class B felony rather than a Class C felony. See Tenn. Code Ann. § 39-13-213(a)(2), (b). That by itself greatly increased the Appellant’s sentencing range. Compare id. § 40-35-112(a)(2) (allowing for sentences between 8 and 12 years for a Class B felony) with id. § 40-35-112(a)(3) (allowing for sentences between 3 and 6 years for a Class C felony). It was thus improper to enhance Appellant’s sentence based upon his blood alcohol content as an independent enhancement factor.<sup>2</sup>

Although the trial court erred by applying enhancement factor (3) and by enhancing Appellant’s sentence based on his blood alcohol content, it properly applied the remaining

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<sup>2</sup> The State did not address this issue in its brief. To the extent it argues the trial court was correct to consider Appellant’s blood alcohol content at sentencing, it appears to do so in the context of the application enhancement factor (10). In addition, the State does not argue that the trial court was correct in its application of enhancement factor (3). Instead, the State’s brief is limited to defending the application of enhancement factors (1) and (10).



enhancement factors. The misapplication of the enhancing factors does not automatically result in a reduction of Appellant's sentence. The record does not suggest the trial court placed a particularly heavy weight on either of the inappropriate considerations. Outside of the trial court's misapplication of enhancement factor (3) and its consideration of Appellant's blood alcohol content, we see no error in the trial court's application of the Sentencing Act. It correctly applied enhancement factors (1) and (10) and considered the principles and goals of the Act. With respect to Appellant's contention that the trial court should have reduced his sentence based upon his acceptance of responsibility, the trial court weighed that mitigating factor and came to its conclusion about the appropriate sentence. Based upon the record, we conclude that enhancing the Appellant's sentence for vehicular homicide from eight years to eleven years is appropriate. Concerning alternative sentencing, the trial court specifically noted that it did not wish to depreciate the seriousness of the offense. While Appellant characterizes that as a perfunctory statement, we do not view the record the same way; it was an important consideration made by the trial court.

### **III. Conclusion**

Upon review of the record and the parties' briefs and argument, we affirm the judgments of trial court.

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NORMA McGEE OGLE, JUDGE